

October 28, 2008

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DISTRICT OF NEW JERSEY NOV 10 A 10:56

Civil Action No. 08-2573

UNITED STATES
DISTRICT COURT

In Regard to the Matter of:

Bayside State Prison

OPINION/REPORT

Litigation

OF THE

SPECIAL MASTER

TODD DeWITT, JR.

-vs-

WILLIAM H. FAUVER, et al,

Defendants.

* * * * *
TUESDAY, OCTOBER 28, 2008
* * * * *

BEFORE THE HONORABLE JOHN W. BISSELL, SPECIAL MASTER

October 28, 2008

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Transcript of proceedings in the above

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matter taken by Theresa O. Mastroianni, Certified

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Court Reporter, license number 30X100085700, and

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Notary Public of the State of New Jersey at the

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United States District Court House, One Gerry Plaza,

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Camden, New Jersey, 08102, commencing at 2:30 PM.

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Audubon, New Jersey 08106

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856-546-1100

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1 Turn now to reopening the matter for a
2 decision of Todd DeWitt, docket number 08-2573.

3 The following constitutes the Special
4 Master's determination regarding Mr. DeWitt's
5 complaint. This opinion/report is being issued
6 pursuant to the Order of Reference to a Special
7 Master and the Special Master's Agreement and the
8 guiding principles of law which underlie this
9 decision to be applied to the facts upon which it is
10 based as set forth in the jury instructions in the
11 Walker and Mejias jury charges to the extent
12 applicable to the allegations in Mr. DeWitt's case.

13 As finalized after review under Local
14 Civil Rule 52.1, the transcript of this oral opinion
15 will constitute the written report required by
16 paragraph seven of the Order of Reference to a
17 Special Master.

18 Mr. DeWitt was housed in Trailer Four
19 East and asserts injuries resulting from his
20 extraction from that trailer on the 1st of August,
21 1997, merely a couple of days after the death of
22 Officer Baker, and it's been confirmed by Exhibit
23 D-249 A that the SOG unit was in there for that
24 extraction in order for the trailer to be searched
25 from and after five o'clock PM on August 1st, 1997.

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1 For reasons that I'll elaborate upon
2 further, I find Mr. DeWitt has sustained his claim
3 based upon the conduct of the officers in his cubicle
4 or cell area, as however it may best be described, at
5 the time of the extraction.

6 The relevant portion of his testimony
7 begins at page 78, line 11 of the September 11, 2008
8 transcript, and he's talking about the arrival of the
9 SOG officers: "Tell me what you heard.

10 I heard them screaming and hollering
11 lo, for people to get face down on the bunk, get face
12 down on the bunk. They started coming down and as
13 they were coming down the tier, they were telling us
14 to get up and strip down. If you weren't getting out
15 of the bed fast enough, they were throwing you on the
16 ground.

17 When they instructed you to strip down,
18 what did you do?

19 I was -- there was a bunk bed, so there
20 was a guy on top. When he got out of the bunk, there
21 was no room for me to get out of the bed. They
22 started screaming for me to get out of the bed, get
23 out. There was no place for me to go. He was
24 already laying naked on the floor.

25 Who was laying naked on the floor?

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1 The guy in the top bunk.

2 So what happened next?

3 I wasn't getting out of the bed fast
4 enough, so they snatched me by my collar and slammed
5 me on the ground.

6 Do you know who snatched you by the
7 collar?

8 I couldn't tell you their names, no.
9 There was SOG -- it was the SOG squad officers.
10 There was a bunch of them. It's a little area. And
11 they were trying to all cram in that little area.
12 There was no place for you to go.

13 Can you describe the SOG officers?

14 Can I describe them?

15 What were they wearing? How were they
16 dressed?

17 Dressed in black with black helmets,
18 with visors down, knee pads, sticks, like pads across
19 here.

20 How many officers entered your area
21 where you were bunked.

22 One time -- I noticed about four or
23 five at one time.

24 At the time you were snatched off the
25 bunk, you said you couldn't identify the officer who

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1 snatched you.

2 No, I couldn't. I know he was a SOG
3 officer by what he was wearing.

4 And what happened to you as a result of
5 being snatched off the bunk?

6 When they slammed me on the ground,
7 they started stomping you and trying to kick you. I
8 got kicked in the testicles.

9 Specifically what happened to you?
10 They started kicking you?

11 They started kicking me, yes.

12 How many times were you kicked?

13 Four, five, six. A number of times. I
14 remember getting kicked in the legs, in the hips.
15 And then I got kicked in the testicles and I couldn't
16 catch my breath. I was on my hands and knees, they
17 were telling me to get up. I can't even breathe."

18 In the course of his testimony after
19 that, he talks about other incidents and other
20 handling, if you will, by the SOG officers in the
21 course of the events of that day.

22 I do not find that any of those are
23 actionable as such, nor do they, if you will, enhance
24 or tip the balance in this case. But I do find that
25 this treatment in the cubicle area or bunk area

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1 certainly, by any and all definitions, which the jury
2 instructions provide for us, constitutes excessive,
3 unnecessary and sadistic force for the purpose of
4 inflicting pain and punishment. Essentially, the
5 officers, by their conduct, put Mr. DeWitt in an
6 impossible situation. I mean, it clearly is
7 demeaning, to say the very least, to require him to
8 strip naked and then lie on top of his bunk mate who
9 was also naked. What the SOG officers might have
10 made of that hardly needs explanation here. So
11 basically he was in a situation where he had to wait
12 his turn until they were finished moving the man from
13 the upper bunk, and they would have none of that. So
14 they threw him down on top of this man anyway, and
15 then proceeded to kick him as he described. I find
16 no reason to think otherwise.

17 Now, Mr. DeSalvo, a new officer at that
18 time, was assigned to the trailer and had a good view
19 of this particular wing. I believe it was classified
20 as D wing. He believed he would be in a position to
21 see if this type of activity, this kicking activity,
22 were taking place. However, he did acknowledge that
23 because of the partitions in these bunk units, he did
24 not have a clear view of the bunk areas themselves or
25 the floor space between them. His view essentially

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1 ended right at or near the end of the bunks in
2 question here. And while he might perhaps, if he had
3 plain view, have been able to see an officer at the
4 end of that bunk kicking a prone inmate, let us
5 remember that Mr. DeWitt testified that there were
6 four or five officers crowded in the immediate area.
7 It is equally plausible that Mr. DeSalvo's view could
8 have been shielded from the officer actually
9 inflicting this punishment by the others standing
10 around him. I take note, among other things, for
11 instance, that in much of the record that's been
12 generated here, even when extractions or movements
13 are being filmed by the Internal Affairs officers,
14 the large crowd of SOG officers in a confined area
15 often has blocked, in whole or in part, the cameras
16 from making the best possible video recordings of the
17 events.

18 So I determine in this case that Mr.
19 DeWitt has sustained his claim in connection with
20 injuries inflicted upon him when confronted in his
21 cell with this Hobson's choice, which the SOG
22 officers then chose to take full advantage of.

23 Now, I understand also, however, that
24 there is an exhaustion issue, and that matter is
25 addressed throughout the transcript, and more

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1 particularly with regard to the question of Mr.
2 DeWitt's fear. I've examined, in particular, the
3 evidence appearing at pages 107 through 112 of the
4 transcript which delve into these matters.

5 As I've mentioned to you before, I have
6 concluded that there are circumstances (in some cases
7 enhanced by those within the prison system to
8 dissuade or discourage an inmate from pursuing
9 potential administrative remedies) where it can truly
10 be said that those remedies are not available. And I
11 talked about fear being one of them, although there
12 are some others.

13 Here at page 107, and this isn't the
14 only page it's discussed, he talks in terms of being
15 about to advise a doctor at Bayside State Prison
16 about what happened to him. However, he also
17 mentions that he had a parole date at that time; he
18 was scheduled to be paroled in October of '97, and
19 indeed was. When discussing this matter with the
20 doctor at some time after the assault, the doctor
21 advised him, and I'm not saying by way of threat, but
22 merely, if you will, as a matter of information,
23 that, in Mr. DeWitt's words, "When I started to tell
24 him about what went on, he said that if I wanted to
25 have it resolved, I could stay longer." What this

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1 means is, of course, for this matter to have been
2 pursued medically, and I find by proper inference,
3 administratively, it could have imperiled his parole
4 date. No small wonder that he chose not to pursue
5 this matter through either medical or administrative
6 remedies given the very short time left at Bayside.

7 Now, it's also developed on the record,
8 however, that shortly after parole he wound up being
9 reincarcerated and went to East Jersey State Prison
10 somewhere in the vicinity of 1998 where he remained
11 until 2004, at least in that stint. Accordingly, as
12 of September, 1999, he had available to him and up
13 until that date the opportunity to pursue
14 administrative remedies at East Jersey.

15 I've already made a determination in a
16 companion case today that East Jersey State Prison
17 did provide administrative remedy procedures that
18 would have allowed him to pursue a complaint about
19 something that had occurred at Bayside.

20 His testimony on this subject includes
21 an excerpt, among others, at page 110 beginning at
22 line 15.

23 "Up through September of 1999 you never
24 filed an administrative remedy form while in East
25 Jersey State Prison, correct?

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1 I only filed the administrative remedy
2 form because I had to.

3 I didn't file it because I didn't want
4 to have the repercussions of filing it in East Jersey
5 or at Bayside.

6 You were afraid while you were in
7 Bayside to file it, right?

8 Yes.

9 And then you got out of prison. And
10 you went back to prison. And you were afraid in East
11 Jersey State Prison to file it. Is that your
12 testimony?

13 Yes."

14 On redirect the subject is addressed
15 again at page 112.

16 "Could you identify any of the SOG
17 officers at Bayside that were involved in your
18 incident?

19 No, I can't.

20 And do you know whether or not any of
21 those officers came from East Jersey State Prison?

22 No, I don't. Alls I know is what I
23 hear, that officers come from all over, from
24 different prisons.

25 So you felt threatened at East Jersey

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1 State Prison?

2 Leery.

3 I'm sorry, I didn't hear you.

4 I said leery."

5 Now, one I suppose might say that
6 merely feeling leery of something may not rise to the
7 level of true fear or apprehension that would excuse
8 exhaustion of remedies, but I've determined in the
9 testimony here as a whole that this man, up through
10 the time of the September, 1999 date that's
11 significant here, did indeed feel fearful of
12 retaliation should he pursue his administrative
13 remedies. And the presence of SOG officers
14 throughout the system, of course, led to at least the
15 possibility that officers from East Jersey were
16 involved in the Bayside detail in August of 1997 and
17 could seek retaliation against him there.

18 This is a close case on exhaustion, I
19 must say, but I find as a mixed question of fact and
20 law, that to Mr. DeWitt, under his circumstances and
21 in his state of mind, a reasonable one under all of
22 the circumstances, the administrative remedy provided
23 in the East Jersey State Prison handbook was not
24 truly available to him as a safe and appropriate
25 course to bring to the attention of authorities the

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1 serious attack upon him at the time of the extraction
2 from his bunk area.

3 I do note, however, that the kicks
4 which he endured, including of course the kick in the
5 testicles, while extremely painful at the outset, did
6 not lead to any permanency.

7 There was indeed excessive unnecessary
8 and sadistic force imposed upon Mr. DeWill here
9 within the contemplation of applicable legal
10 principles. However, in light of the fact that this
11 attack was not prolonged and was not indeed repeated
12 even in the course of that day, while actionable for
13 recovery of compensatory damages, I do not find that
14 this assault visited upon him rose to the level of
15 being so egregious as to support a claim for punitive
16 damages, at least against the unidentified officers
17 who were with him and including the one who inflicted
18 this injury.

19 Therefore, while I make a finding that
20 the conduct, although actionable, supports an award
21 of compensatory damages, it was not so egregious as
22 to support an award of punitive damages under
23 applicable legal standards.

24 Finally, although not every item of
25 evidence has been discussed in this opinion/report,

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1 all evidence presented to the Special Master was
2 reviewed and considered.

3 I find that the injury inflicted here
4 is actionable. I find that the injury was acute
5 initially, although not prolonged or permanent. Of
6 course, it doesn't take much imagination to consider
7 and evaluate the acuteness and severity of the pain
8 in the short run when you are kicked in the
9 testicles. It was indeed severe, although not
10 prolonged.

11 Accordingly I recommend in this report
12 that the District Court enter an award of
13 compensatory damages in the amount of eight thousand
14 dollars in Mr. DeWitt's favor.

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C E R T I F I C A T E

I, Theresa O. Mastroianni, a Notary Public and
Certified Shorthand Reporter of the State of New
Jersey, do hereby certify that the foregoing is a
true and accurate transcript of the testimony as
taken stenographically by and before me at the time,
place, and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a
relative nor employee nor attorney nor counsel of any
of the parties to this action, and that I am neither
a relative nor employee of such attorney or counsel,
and that I am not financially interested in the
action.



Theresa O. Mastroianni, C.S.R.

Notary Public, State of New Jersey

My Commission Expires May 5, 2010

Certificate No. XI0857

Date: October 28, 2008

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